IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0403

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN DAVID STRONG,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Prairie County, The Honorable Richard A. Simonton, Presiding

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2. Did the district court abuse its discretion when it denied Appellant's motion for a mistrial based on the State's intentional elicitation of evidence of prior violence against the victim's mother, in violation of the motion *in limine* and Montana Rule of Evidence 404(b)?

3. Is the sentence condition ordering restitution to Blue Cross and Blue Shield illegal?

STATEMENT OF THE CASE

On March 28, 2008, Shawn Strong (Strong) was charged by Information with felony aggravated assault, in violation of Mont. Code Ann. § 45-5-202, and in the alternative with felony assault on a minor, in violation of Mont. Code Ann. § 45-5-212. (D.C. Doc. 3.)

After various pretrial motions, including the motion to dismiss at issue on this appeal, trial was held on January 26-27, 2009. The jury found Strong guilty of the charge of aggravated assault. (Tr. at 346.) The district court sentenced Strong as a persistent felony offender to the Montana State Prison for forty years, with

twenty years suspended. (D.C. Doc. 51 at 2.) Strong filed a timely notice of appeal. (D.C. Doc. 53.)

STATEMENT OF FACTS

On March 24, 2008, Strong was caring for his son, K.S., while K.S.'s mother, Teal Finneman, was at work. (Tr. at 178.) During the night, K.S. vomited twice, and Strong alerted Finneman. (Tr. at 181-82, 197.) On March 26, 2008, K.S. was admitted to the hospital and later diagnosed with a Grade III liver laceration. (Tr. at 211, 230, 269.) There were no witnesses to the injury. (Tr. at 196-97, 215.)

Delay in Initial Appearance and Motion to Dismiss

On March 28, 2008, an Information was filed charging Strong with aggravated assault and in the alternative assault on a minor. (D.C. Doc. 3.) That day, Strong was arrested and incarcerated. (D.C. Doc. 4.) Strong sat in jail awaiting an initial appearance to be informed of the charges against him and of his right to counsel for more than a month and a half before the Office of the Public Defender finally stepped in and entered an appearance on its own initiative on April 29, 2008. (D.C. Doc. 5.)

Finally, on May 9, 2008--after forty-two days of incarceration after arrest--Strong received his initial appearance. ("Initial Appearance-District Court" form,

filed May 5, 2008 (hereinafter "Initial App.").[1]) Strong appeared before a Dawson County justice of the peace, acting for the Prairie County justice of the peace. According to the Initial App., Strong was informed of the charges, the maximum and minimum penalties, and of his right to an attorney. He requested an attorney, and bond was set at $25,000. (Initial App.) The justice of the peace then entered an order remanding Strong to the custody of the Sherriff of Dawson County to be delivered to the district court in Prairie County. (D.C. Doc. 7.)

On June 4, 2008, Strong appeared with counsel for an arraignment in Prairie County District Court. (D.C. Doc. 10; June 4, 2008 minute order.[2])

On October 6, 2008, Strong filed a motion to dismiss. (D.C. Doc. 24.) The motion contended Strong was denied due process rights under the United States Constitution and the Montana Constitution Article II, § 7, as well as statutory rights under Mont. Code Ann. § 46-7-101 requiring he be brought before the nearest judge for an initial appearance without unnecessary delay. (D.C. Doc. 24.) The State filed its response on October 15, 2008, and a hearing was held on

[1] The initial appearance form bears a file date of May 5, 2008, and is in the district court file, but does not appear on the district court case register and does not bear a district court document number.

[2] The June 4, 2008 minute order appears in the district court record on file with this Court, but was not entered on the case register report. It bears the incorrect date of June 4, 2006.

November 7, 2008. (D.C. Doc. 23; Tr. at 5.) The State conceded that the delay in Strong's initial appearance violated Mont. Code Ann. § 46-7-101, but it contended that the only available remedy was suppression of evidence obtained during the interval between arrest and initial appearance. (Tr. at 23.) (Counsel for Strong and the State both thought at that time that Strong's initial appearance had taken place at the June 4, 2008 arraignment. (Tr. at 26.))

On November 24, 2008, the district court filed its order denying Strong's motion to dismiss. (D.C. Doc. 34, attached as Ex. 1.) The district court noted that Strong's initial appearance did not occur until May 9, 2008, forty-two days after his arrest. (D.C. Doc. 34 at 3.) Nevertheless, the district court held that Strong failed to argue his defense was impaired by the delay or that his incarceration was "enhanced." The district court reasoned that, because Strong had not posted bail since the May 9 hearing, "there was no indication that [Strong] would have posted bail and been released" had he had an initial appearance earlier as required by statute. (D.C. Doc. 34 at 4.)

Motion *In Limine*

On January 22, 2009, Strong filed a motion *in limine* asking the district court to enter an order prohibiting the State from referring to any prior crimes or wrongful acts, contending the evidence was inadmissible under Montana Rule of Evidence 402 because it was irrelevant; under Montana Rule of Evidence 403

because any relevance was outweighed by potential prejudice; and under Montana Rule of Evidence 404(b) as evidence of other crimes, wrongs or acts to prove character to show action in conformity therewith. (D.C. Doc. 42.)

In a hearing prior to trial on January 26, 2009, the State acknowledged that it had not given *Just* notice of intent to use prior acts evidence. (Tr. at 38.) The State said it "believe[d] it would be prejudicial for the State to reference any other prior violent actions against other family members. The State has no intention at this time of introducing such evidence." (Tr. at 38-39.) Nevertheless, the State then apparently tried to argue that witness observation of "temper" issues, particularly toward K.S. or Finneman, was relevant to "a full understanding of not only the defendant's state of mind, but also for a full understanding of the tenor of the household. I don't believe it is character evidence." (Tr. at 40.)

The district court granted the motion *in limine*. (Tr. at 39.) The court also ruled that it would allow evidence of prior crimes or bad acts only to the extent it would support the requisite mental state of the offense, and prohibited counsel from referring to it in opening statements. (Tr. at 41.)

Trial commenced on January 26, 2009. The State presented five witnesses and the defense presented none.

Testimony of Teal Finneman and Motion for Mistrial

The State's first and most important witness was Finneman, K.S.'s mother. (Tr. at 171.) Finneman's testimony was the only evidence that linked Strong (circumstantially) to K.S.'s injury.

Finneman testified that K.S. previously had been attending daycare, and that her parents and sister generally watched K.S. (Tr. at 195-96.) When she left for work on the evening of March 25, 2008, she left K.S. in Strong's care. (Tr. at 178-79.) Before leaving for work, Finneman had been caring for K.S.. (Tr. at 179.) Finneman testified that K.S. was "normal," "happy and playful," when she left him with Strong. (Tr. at 179.)

K.S. vomited twice during the night; after each time, Strong contacted Finneman to inform her. (Tr. at 181-82.) K.S. had the flu a couple weeks prior, during which he vomited, but Finneman did not take him to a doctor. (Tr. at 197.) Finneman testified that when she returned from work, K.S. acted like he was in pain. (Tr. at 183.) Eventually, Finneman's mother, Mary Johnson, took K.S. for medical care. (Tr. at 185-87.) Strong told Finneman he did not know what had caused K.S.'s injury; he speculated that maybe K.S. had fallen on a toy or was injured during a game when Strong tossed him onto the couch or jumping off some couch cushions. (Tr. at 190.)

Pertinent to the motion for mistrial, Finneman also testified during direct examination that when she came home from work on March 26, 2008, Strong was playing video games and K.S. was lying on the couch behind him. (Tr. at 182-83.) On cross-examination, Strong's counsel elicited testimony that Finneman had given a conflicting statement to Detective Dahl immediately after the incident in which she said that Strong was good to K.S. and K.S. loved him, and that when she came home from work that day, Strong and his son were cuddling on the couch. (Tr. at 197-98.) Finneman testified that she was not telling the officer the truth at the time of that statement. (Tr. at 198.)

On redirect examination, counsel for the State asked Finneman why she had changed her testimony; she replied that previously she "was scared of Shawn." (Tr. at 199-200.) Counsel then asked her "You're no longer afraid of Mr. Strong?" (Tr. at 200.) Defense counsel objected, contending the State was attempting to elicit irrelevant and prejudicial information, inadmissible under the Rules of Evidence and in violation of the motion *in limine*. (Tr. at 200-01.) The district court overruled the objection on the grounds that the witness was entitled to explain why her testimony was different, and invited the State to ask "why" Finneman was scared of Strong. (Tr. at 200-01, attached as Ex. 2.) The State did so, and Finneman responded: "Because he had been violent toward me in the

past." (Tr. at 201.) Strong moved for a mistrial based on the State's intentional elicitation of this evidence, which the court denied. (Tr. at 201.)

The following day, the district court clarified its ruling. (Tr. at 251-52, attached as Ex. 3.) The court explained that it allowed the follow-up question as a "logical question under the circumstances." (Tr. at 251.) The court believed that it was not "fair" to the jury to have to wonder "what [Finneman] was scared of"; the court surmised that she could have been scared charges would be filed against her or that her child would be taken away or of some action by the defendant. (Tr. at 251.) The court explained that rather than have the jury "wonder what [Finneman] was scared of," he allowed the State to elicit the testimony about Strong's past violence. (Tr. at 252.) The court further stated that it didn't "think the witness's answer got into other acts. I think it was simply an explanation of a number of possible reasons why she could have been scared." (Tr. at 252.) The court prohibited the State from "get[ting] into the area of violence" in its closing argument. (Tr. at 252.)

Other Testimony

The State's next witness was Mary Johnson, Finneman's mother. (Tr. at 202.) Johnson testified that she had a strained relationship with Strong. (Tr. at 204.) Her husband and she cared for K.S. often during the months of January and February, and off and on during March 2008. (Tr. at 204.) They and another

daughter watched K.S. the weekend immediately before he was hospitalized. (Tr. at 207.) Johnson did not observe K.S. every moment he was at her house. (Tr. at 217-18.) Johnson testified that she took K.S. for medical care for the injury and that he was hospitalized for under a week. (Tr. at 211-12.) After discharge, K.S.'s treatment was to be subdued and not risk re-injury; ultimately, he fully recovered. (Tr. at 213, 219.) Johnson stated she has no personal knowledge of what caused K.S.'s injury. (Tr. at 215.)

The State's third witness was Dr. David J. Kaderis, general surgeon at Holy Rosary Hospital. (Tr. at 225.) Dr. Kaderis testified that, based on the CAT scan, K.S. was diagnosed with a Grade III liver laceration, which is a laceration that is greater than one centimeter in length. (Tr. at 231, 240.) This was a serious injury that would require a high level of force. (Tr. at 233.) When asked to determine the age of the injury, Dr. Kaderis testified that the injury was "recent." (Tr. at 232.) Symptoms of this type of injury would appear probably within the first thirty minutes and would include crying, holding of the belly, and vomiting. (Tr. at 234.)

The State's fourth witness was Dr. Lourdes Reynolds, a pediatrician at a clinic in Miles City. (Tr. at 224.) Dr. Reynolds examined K.S. on March 26, 2008, and noticed he appeared to be in pain. (Tr. at 258.) Dr. Reynolds admitted K.S. to the hospital and ordered a CAT scan, which the radiologist told her reflected a Grade III liver laceration. (Tr. at 268, 270.) Dr. Reynolds testified that

this was not a type of injury a child would inflict upon himself. (Tr. at 272-73.) She also testified that some symptoms would develop within the first few hours of the injury. (Tr. at 273.)

The final witness was Marvin Dahl, criminal investigator for the State. (Tr. at 277.) Dahl testified that he identified Strong as a "person of interest" because of information he gathered that Strong was the last person with K.S. before his symptoms arose. (Tr. at 282.) He spoke with Strong, who consistently denied knowing what happened to K.S. and said that he loved his son and did not hurt him. (Tr. at 288.) Strong never wavered from saying he did not know what happened and that he did not injure K.S. (Tr. at 288.)

Conviction and Sentencing

The trial concluded on January 27, 2009, with the jury's return of a guilty verdict on the count of aggravated assault. (Tr. at 346.)

Strong was sentenced on April 15, 2009. (Tr. at 348-49.) The sole witness was John K. Uden, the probation officer who prepared the presentence investigation (PSI). (Tr. at 355.) In the PSI and at the sentencing hearing, Uden recommended the district court impose restitution of $11,194.11 to Blue Cross and Blue Shield (hereinafter "Blue Cross"), for its payments of the victim's medical care. (PSI at 9; Tr. at 365.) The PSI did not include an affidavit from the insurance company as to its costs, nor was any evidence presented at the

sentencing hearing in support of restitution, including the insurance contract. Strong's counsel did not contest that Blue Cross did pay $11,194, nor did counsel raise the fact that no affidavit or evidence had been produced in support of the restitution request. (Tr. at 382.) Rather, counsel objected to restitution to the insurance company on the basis that Blue Cross was not a "victim" as defined by the statute. (Tr. at 382.)

The district court rejected the argument, stating that it "look[ed] at them as a victim," because the company was "out that sum simply because of an insurance contract." (Tr. at 397, attached as Ex. 4.) In its written judgment, the district court imposed restitution in the amount of $11,194.11 to Blue Cross. (D.C. Doc. 51 at 7, attached as Ex. 5.)

STANDARD OF REVIEW

The denial of a motion to dismiss in a criminal case is a question of law which this Court reviews *de novo*. *State v. Gatlin*, 2009 MT 348, ¶ 15, 353 Mont. 163, 219 P.3d 874.

"A motion for a mistrial will be granted when there is either a demonstration of manifest necessity, or where the defendant has been denied a fair and impartial trial." *State v. Long*, 2005 MT 130, ¶ 13, 327 Mont. 238, 113 P.3d 290. This Court reviews a denial of a motion for a mistrial for abuse of discretion. *Long*, ¶ 13.

This Court reviews a sentence that includes at least one year of incarceration for legality only. *State v. Ariegwe*, 2007 MT 204, ¶ 174, 338 Mont. 442, 167 P.3d 815. The Court determines "whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court followed the affirmative mandates of the applicable sentencing statutes." *State v. Breeding*, 2008 MT 162, ¶ 10, 343 Mont. 323, 184 P.3d 313. The determinations are questions of law this Court reviews *de novo*. *Breeding*, ¶ 10.

Ineffective assistance of counsel claims are mixed questions of law and fact which this Court reviews *de novo*. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

SUMMARY OF ARGUMENT

Strong sat in jail for forty-two days before receiving an initial appearance at which he was informed of the charges against him and of his rights, including the right to counsel, as required by Mont. Code Ann. §§ 46-7-101 and -102. The delay--which the State contributed to mere "miscommunication" between law enforcement agencies--was unnecessary. The district court erred when it denied Strong's motion to dismiss. Under *Gatlin*, the appropriate remedy is to vacate the conviction and dismiss the Information without prejudice.

The district court abused its discretion when it denied Strong's motion for a mistrial. Before trial the State admitted that evidence of prior violence against the victim's mother would be prejudicial, and the court granted a motion *in limine* as to such evidence. Nevertheless, the State intentionally elicited this inflammatory testimony while attempting to rehabilitate the mother's credibility. The district court abused its discretion when it failed to limit the scope of the witness's testimony to avoid unfairly prejudicial testimony. Given the prejudicial nature of the testimony, the relatively weak evidence in the case, and the district court's failure to give a cautionary instruction, a reasonable possibility exists that the evidence of prior violence might have contributed to Strong's conviction.

The restitution condition requiring payment to Blue Cross was illegal. Blue Cross did not meet the statutory definition of a "victim" under Mont. Code Ann. § 46-18-243(2)(a)(iv) because there was no evidence Blue Cross had a right of subrogation. Moreover, there was no affidavit from Blue Cross describing its losses as required by Mont. Code Ann. § 46-18-242. In the alternative, Strong received ineffective assistance of counsel as to the restitution condition. There was no plausible justification for, and counsel's performance was deficient because of, his failure to specifically argue there was no evidence of Blue Cross' right to subrogation; his concession of the amount that Blue Cross paid; his failure to argue there was no victim affidavit; and his failure to argue the district court could not

impose restitution in the absence of substantial evidence of loss as required by Mont. Code Ann. § 46-18-243.

ARGUMENT

I. THE INFORMATION SHOULD HAVE BEEN DISMISSED WITHOUT PREJUDICE BECAUSE STRONG WAS NOT GIVEN AN INITIAL APPEARANCE AND INFORMED OF HIS RIGHTS, INCLUDING THE RIGHT TO COUNSEL, WITHOUT UNNECESSARY DELAY.

Montana Code Annotated § 46-7-101 requires that a person arrested "must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance." At the initial appearance, the judge is required to inform the defendant of: the charge(s) against him, his right to counsel and to have counsel assigned, the general circumstances under which he may obtain pretrial release, his right to refuse to make a statement and that any statement may be offered in evidence at trial, that conviction may result in loss of various firearm rights, and the right to a judicial determination of probable cause for felony charges. Mont. Code Ann. § 46-7-102. Further, every defendant must be asked if he desires the aid of counsel; if a defendant is charged with a felony or misdemeanor where incarceration is a sentencing option, and such defendant desires counsel but is unable to afford private counsel, the court shall order the office of the state public defender to assign counsel to represent the defendant

without unnecessary delay pending an eligibility determination. Mont. Code Ann. § 46-8-101.

As this Court recently noted in *Gatlin*, ¶ 22, "[a]n important purpose behind requiring an initial appearance is to protect the defendant from being jailed for an indefinite period of time and to prevent him from being held incommunicado for a protracted time." *Gatlin*, ¶ 22 (*citing State v. Dieziger*, 200 Mont. 267, 270, 650 P.2d 800, 802 (1982)). Moreover, "[u]nnecessarily delaying an initial appearance before a judge, where the duty of the court is to advise the defendant of his right to counsel[,] shocks the concept of fundamental fairness and due process." *Gatlin*, ¶ 22 (internal quotation marks and citation omitted).

Gatlin is on point to the instant case. Gatlin was arrested in Butte on robbery charges; while in jail in Butte he was served with an arrest warrant for Missoula robbery charges. *Gatlin*, ¶ 7. One week later, Gatlin made an initial appearance on the Missoula charges in the Butte-Silver Bow Justice Court. *Gatlin*, ¶ 21. However, at the initial appearance he was not informed of his right to counsel or his right to counsel at State expense if he could not afford private counsel. *Gatlin*, ¶ 21. Accordingly, counsel was not appointed by the court; eventually, eighty-one days after the initial appearance, the Office of the Public Defender entered an appearance on Gatlin's behalf following his request to them for counsel. *Gatlin*, ¶ 9. After sentencing on the Butte charges, Gatlin received

another initial appearance, this time in Missoula, followed by the filing of an Information. *Gatlin*, ¶ 11.

Gatlin filed a motion to dismiss the Missoula Information, on the basis that he was not informed of his right to counsel at the initial appearance, and that the Information had not been filed in a reasonable time, which the district court denied. *Gatlin*, ¶ 12. This Court reversed. The Court reasoned that the purpose behind the initial appearance "is to ensure the defendant is duly informed of his constitutional rights as soon as possible. Neglecting to inform an incarcerated defendant of his right to counsel as required by §§ 46-7-102(1)(b) and 46-8-101 MCA, taints the fundamental fairness of all subsequent proceedings." *Gatlin*, ¶ 23. Accordingly, "the appropriate remedy is to vacate his conviction and order the Missoula County Information dismissed." *Gatlin*, ¶ 23.

The Court then determined that under the circumstances of Gatlin's case the Information should be dismissed without prejudice, because the record did not show that Gatlin was prejudiced by the lack of counsel during the eighty-one days between the initial appearance and counsel's entry of appearance. *Gatlin*, ¶ 27. Specifically, the Missoula County Attorney did not advance the case against Gatlin, no critical confrontations with prosecution occurred, no new evidence was gathered, counsel could not have provided additional protection from prosecution

of the charges, and there was no evidence the State benefitted from the defective initial appearance. *Gatlin*, ¶ 27.

Just as the district court erred in denying Gatlin's motion to dismiss, the district court here erred by denying Strong's motion to dismiss. Strong was arrested and incarcerated on March 28, 2008. He waited for nearly a month and a half in jail before finally receiving an initial appearance. During those forty-two days he was not informed of any of his rights under Mont. Code Ann. § 46-7-102, including of his right to appointed counsel. And until the local Office of the Public Defender took it upon itself to reach out to Strong and enter an appearance, Strong was "held incommunicado" for more than a month (thirty-three days). *See Gatlin*, ¶ 22.

The State has never contended the delay in Strong's initial appearance was necessary (rather, it disputed *only* the remedy). (Tr. at 23.) Indeed, the State went so far as to admit that "it would be ludicrous . . . to argue to the Court" that the delay was acceptable. (Tr. at 23.) Even after the district court informed the State that the delay in initial appearance was actually forty-two days, not sixty-eight as the parties had thought, the State did not change its position that the delay was "unacceptable" by taking up the district court's invitation for supplemental briefing on the issue. (Tr. at 27.)

Nor can there be any dispute that the delay in Strong's initial appearance was unnecessary. This Court has noted in the context of a motion to suppress that the defendant bears the burden to show the delay was unnecessary, and the "court should focus on the diligence of the persons who made the arrest in bringing the defendant before the nearest and most accessible judge. While the length of time between arrest and initial appearance is not determinative of the 'necessity' of the delay, it is a factor to be considered." *State v. Benbo*, 174 Mont. 252, 262, 570 P.2d 894, 900 (1977). Here, as in *Benbo*, there was no effort made to bring Strong before a judge--in this case, for forty-two days. Strong contended before the district court that the State could have brought him before a judge earlier but failed to do so for no good reason. (Tr. at 21.) The State's sole explanation for the delay "was the result of miscommunication between two county law enforcement agencies." (D.C. Doc. 25 at 3.) The case did not involve complicated charges, or a claim that there was no judge available, or a continuing investigation. *Compare with State v. Beach*, 217 Mont. 132, 150, 705 P.2d 94, 105 (1985) (delay of "several days" was not unnecessary where defendant did not claim he could have been brought for an initial appearance earlier, and where defendant was being held out of state and various charges were bring raised, investigated, and dropped).

The very purpose of an initial appearance was violated here: "to protect a defendant from being jailed for an indefinite period of time and to prevent him

from being held incommunicado for a protracted time." *Gatlin*, ¶ 22. And in this respect this case differs from the other case this Court has addressed involving a delay in initial appearance of forty-two days, *Dieziger*, 200 Mont. at 270, 650 P.2d at 802. There, the defendant committed the offense at issue while incarcerated. The Court noted that because the defendant was already in custody of the State prison, no arrest was necessary "and the need to bring him before a magistrate to prevent unjust incarceration did not exist." *Dieziger*, 200 Mont. at 270, 650 P.2d at 802.

This unnecessary delay, during which a defendant sat in jail without being informed of his rights for no reason other than the State's mismanagement of his case, "shocks the concept of fundamental fairness and due process." *Gatlin*, ¶ 22 (quotation and citation omitted). The Information should have been dismissed, and the State should have had to re-initiate proceedings in accordance with statutory requirements and protections of Mont. Code Ann. §§ 46-7-101 and -102.

Although in *Gatlin* the defendant did make an initial appearance without unnecessary delay but was he was not informed of the right to counsel (until the later, proper initial appearance), while Strong received no initial appearance at all until an unnecessary delay of forty-two days, there is no principled distinction between the two scenarios that would dictate a different outcome here. In either case, the defendant was not "informed of his constitutional rights as soon as

possible," in particular the right to counsel, and in both cases the failure "to inform an incarcerated defendant of his right to counsel . . . taints the fundamental fairness of all subsequent proceedings." *Gatlin*, ¶ 12. And in Strong's case, the violation is even more egregious than in *Gatlin*; unlike Gatlin who received a timely initial appearance at which he was at least informed of the charges and bail was set, Strong was not informed of the charges, bail had not been set, nor had any of the other requirements of Mont. Code Ann. § 46-7-102 been met while he sat incarcerated for nearly a month and a half. Under *Gatlin*, "the appropriate remedy is to vacate [the] conviction" and order the Information dismissed. *Gatlin*, ¶ 23. And, as in *Gatlin*, the Information should be dismissed without prejudice, since the record does not reflect the State advanced its case or gathered evidence against Strong during the delay. *Gatlin*, ¶ 27.

The district court, however, denied Strong's motion to dismiss and in doing so erred. The district court reasoned that Strong failed to demonstrate that "his incarceration was enhanced by waiting 43 days before he was brought" before a judge, since he did not demonstrate he would have made bail if he had received a timely initial appearance. (D.C. Doc. 34 at 4.) This misses the point. The purpose of an initial appearance is not simply to set bail; it also informs a defendant as soon as possible after arrest of important rights, including the constitutional right to counsel, and prevents a defendant from being held in jail, incommunicado, without

assistance of counsel. *Gatlin*, ¶¶ 22-23. A defendant's ability to make bail cannot inform the analysis of a violation of Mont. Code Ann. §§ 46-7-101 and -102; otherwise, the State could incarcerate indigent defendants for unreasonably long periods without repercussion, but not defendants who could have afforded to make bail had they been given an initial appearance without unnecessary delay.

The district court also denied the motion to dismiss because Strong had failed to establish his defense was impaired by the delay. However, as this Court set forth in *Gatlin*, prejudice is relevant to whether dismissal is with or without prejudice. *Gatlin*, ¶¶ 23-29. The threshold question of violation does not turn on prejudice. *Gatlin*, ¶ 23.

The State argued before the district court that suppression is the *only* available remedy for a violation of the statutory initial appearance requirement. (D.C. Doc. 25 at 4.) However, under current Montana law a defendant may seek either suppression or dismissal of the Information (with or without prejudice). If a defendant makes a motion to suppress evidence based on a failure to receive a prompt initial appearance, the defendant must demonstrate the delay was unnecessary; the burden then shifts to the government to show the evidence obtained during the delay was not reasonably related to the delay. *Benbo*, 174 Mont. at 262, 570 P.2d at 900. If a defendant instead files a motion to dismiss, dismissal is appropriate where a defendant is incarcerated and is not given an

initial appearance without unnecessary delay at which he is fully informed of his rights in accordance with Mont. Code Ann. §§ 46-7-101 and -102, in particular the right to counsel. *Gatlin*, ¶ 23. If the defendant can further show prejudice from the delay, such dismissal will be with prejudice; if he cannot, dismissal is without prejudice. *See Gatlin*, ¶¶ 24-29.

Moreover, this Court has "recognize[d] the importance of this requirement" of a prompt initial appearance at which a defendant is informed of his rights, and of the necessity of providing adequate remedy to ensure the State complies with the requirement. *Benbo*, 174 Mont. at 261-62, 570 P.2d at 900. If suppression were the only available remedy for a violation of statutory initial appearance requirements (which, under *Gatlin*, it is not), then the State could incarcerate people for indefinite periods of time without a court informing them of the charges against them and without informing them of the right to counsel; so long as no evidence was obtained during this time (no matter how long the delay or whether defendant was otherwise prejudiced), there would be no consequences to the government. Such is not the law in Montana, nor should it be.

The district court erred when it denied Strong's motion to dismiss. The conviction should be vacated, and the Information dismissed without prejudice. *Gatlin*, ¶ 31.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED STRONG'S MOTION FOR A MISTRIAL BASED ON THE STATE'S ELICITATION OF TESTIMONY ABOUT PRIOR CRIMES.

During trial on redirect examination of Finneman, the State intentionally elicited Finneman's testimony that Strong "had been violent toward [her] in the past." (Tr. at 201.) This testimony was inadmissible and prejudicial evidence of prior crimes and there is a reasonable possibility that it may have contributed to his conviction. Accordingly, the district court abused its discretion when it denied Strong's motion for a mistrial on this basis.

Evidence of a defendant's prior crimes--including those of like nature to those charged--generally is not admissible. *State v. Derbyshire*, 2009 MT 27, ¶ 21, 349 Mont. 114, 201 P.3d 811. The dangers in admitting such evidence include the danger the jury will prejudge a defendant and deny him a fair opportunity to defend against a particular charge, or convict a defendant merely because he is an unsavory person or because the jury thinks that he is more likely to have committed the offense because he has committed a crime in the past. *Derbyshire*, ¶ 22. Thus, this Court has said:

> the general rule barring proof of other crimes should be strictly enforced in all cases where applicable, because of the prejudicial effect and injustice of such evidence, and should not be departed from except under conditions which clearly justify such a departure. The

> exceptions should be carefully limited, and their number and scope not increased.

Derbyshire, ¶ 22.

Montana Rule of Evidence 404(b) provides that, while evidence of past crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith, it may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Such evidence is admissible under Rule 404(b) only upon compliance with the substantive and procedural criteria of the Modified *Just* Rule. *See State v. Matt*, 249 Mont. 136, 142-43, 814 P.2d 52, 56 (1991). This includes the requirement that the State give notice of its intent to use such evidence. *Matt*, 249 Mont. at 142-43, 814 P.2d at 56.

Before trial the State acknowledged that it had not given *Just* notice of intent to use prior acts evidence. (Tr. at 38.) Indeed, the State conceded that evidence of prior violent actions against other family members would be prejudicial and stated that it had no intention of using such evidence. (Tr. at 38-39.) Because the requirements of *Matt* were not met, evidence of prior violence against Finneman was not admissible under Rule 404(b).

Notwithstanding the inadmissibility of the evidence of prior violence under Rule 404(b) and *Matt* and the court's prior ruling on Strong's motion *in limine*, the State intentionally elicited Finneman's testimony of prior violence against her.

The State contended, and the district court ruled, that Strong had opened the door to the testimony and Finneman was entitled to explain why her testimony about Strong differed from her statement to Detective Dahl. (Tr. at 200-01.)

"[O]nce a party opens the door regarding certain evidence, the opposing party has the right to offer evidence in rebuttal, including evidence of other acts." *State v. Veis*, 1998 MT 162, ¶ 18, 289 Mont. 450, 962 P.2d 1153. Strong does not contest that Finneman was entitled to explain why she changed her story, specifically, that she did so because she was "scared of Shawn." (Tr. at 199-200.)

Nevertheless, there are limits to how wide a door is opened, especially as to evidence as prejudicial as prior crimes. A defendant always has a right to a fair trial under Article II, Section 24 of the Montana Constitution and the Sixth Amendment of the United States Constitution. Thus, even where a defendant has opened the door to an issue, this Court will examine whether the testimony that follows is "very limited and . . . not unfairly prejudicial." *See Veis*, ¶ 19 (holding the district court did not abuse its discretion in allowing the victim to testify about prior acts to rehabilitate his credibility where the testimony was very limited and not unfairly prejudicial); *see also*, Mont. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

Here, unlike in *Veis*, the district court failed to protect Strong's right to fair trial by limiting Finneman's testimony to avoid unfairly prejudicial testimony about prior criminal acts. Finneman already had explained why she changed her testimony--because she was scared of Shawn. It was not necessary for the State to go further and ask her why she was scared of Shawn, knowing full well the answer would elicit evidence of prior violence against Finneman--the very evidence the State had conceded would be prejudicial and had agreed not to elicit. The testimony should have been limited to what was necessary to explain the change in testimony. Any relevance of the prior violence to Finneman's credibility was vastly outweighed by the prejudicial impact of the evidence. *See* Mont. R. Evid. 403; *see e.g.*, *State v. White*, 202 Mont. 491, 496, 658 P.2d 1111, 1113-14 (1983) (reversing the district court's decision to allow evidence of the witness's prior misconduct unrelated to truthfulness and finding the court should have excluded it under Rule 403 because it created unfair prejudice and confusion of the issues).

The district court, however, failed to consider whether the evidence's prejudicial impact outweighed its probative value. The district court invited the State to ask Finneman why she was afraid of Strong, because it was the next "logical" question and because it would be "unfair" to the jury to wonder what Finneman was afraid of. (Tr. at 251.) But, Finneman already had explained what she was afraid of: Strong. There simply was no reason to go further and elicit

testimony that Strong had been violent to Finneman in the past. And, "logic" or "unfairness" to the jury is not relevant to whether evidence's prejudicial impact outweighs its probative value.

Moreover, this Court has made clear that the general rule barring proof of prior crimes should be strictly enforced and departed from only under conditions that clearly justify such a departure. *Derbyshire*, ¶ 22 (citation omitted). The circumstances here did not justify such a departure. Finneman was allowed to explain why she changed her story. The incremental relevance of why exactly she was afraid of Strong did not justify a departure from the general rule barring evidence of prior crimes. Accordingly, the district court abused its discretion in admitting evidence of Strong's prior violence against Finneman.

Further, the district court abused its discretion when it denied Strong's motion for a mistrial after admission of the evidence of prior violence against Finneman. A mistrial is appropriate "where there is a reasonable possibility that inadmissible evidence might have contributed to the conviction." *State v. Partin*, 287 Mont. 12, 18, 951 P.2d 1002, 1005 (1997). "In determining whether a prohibited statement contributed to a conviction, the strength of the evidence against the defendant--together with the prejudicial effect of the testimony and whether a cautionary jury instruction could cure any prejudice--must be considered." *Partin*, 287 Mont. at 18, 951 P.2d at 1005.

In assessing the strength of the evidence against the defendant, this Court has found evidence such as confessions, physical evidence linking a defendant to the crime, and eyewitness testimony as strong evidence of guilt. *State v. Scarborough*, 2000 MT 301, 302 Mont. 350, 14 P.3d 1202 (finding inadmissible prior crimes could have little prejudicial effect where two eyewitnesses testified, overwhelming physical evidence linked the defendant to the crimes, and the defendant confessed to police); *State v. Walker*, 280 Mont. 346, 353, 930 P.2d 60, 64 (1996) (eyewitness and in-court identification). In contrast, this Court has found evidence weak where there was no eyewitness testimony and the defendant maintained his innocence. *Partin*, 287 Mont. at 19, 951 P.2d at 1006.

Here, the State's evidence was not strong. There was no confession or physical evidence linking Strong to the crime or eyewitnesses to the crime. Strong maintained his innocence. The evidence was wholly circumstantial. Medical evidence suggested a traumatic injury close in time to when K.S.'s symptoms arose. (Tr. at 232, 273.) Finneman testified that K.S. was fine when she left for work and that Strong was the last person to care for K.S. before symptoms arose. (Tr. at 178-79.) Finneman's testimony was the only link between Strong and K.S.'s injury. And, her credibility was impugned; not only did she have a compelling personal interest in placing blame on another for her child's injury, but evidence was presented that she changed her story from what she told police

immediately after the event to her later testimony at trial. (Tr. at 197-98.) The State's case was circumstantial and rested largely on the testimony of a witness with questionable credibility. Under the first *Partin* factor, the evidence was not strong.

Under *Partin*, the Court also considers the prejudicial effect of the testimony. Evidence of prior bad crimes inevitably involves prejudice to the defendant. *Partin*, 287 Mont. at 19, 951 P.2d at 1006. To determine the extent of prejudice, this Court has considered whether the nature of the prior crimes is revealed. For example, this Court has found slight prejudicial effect where the witness did not testify about the nature of charges. *State v. Maier*, 1999 MT 51, ¶ 63, 293 Mont. 403, 977 P.2d 298 (finding prejudice was slight where witness did not testify or speculate about the nature of charges and the jury could only infer that the defendant previously had been convicted of some crime). In contrast here, the nature of the crime was explicit--prior violence against Finneman--and inflammatory, especially given its similarity to the offense charged. *See Walker*, 280 Mont. at 356, 930 P.2d at 66 ("Evidence that a person accused of a crime has committed similar acts in the past is among the most prejudicial types of evidence that can be offered. That is why evidence of prior acts is normally inadmissible.") (Trieweiler, J, dissenting).

Moreover, this Court has found prejudice where the State has agreed, and the district court has ruled in a pretrial motion *in limine*, that prior crimes evidence would be prejudicial--as in the case here. *Partin*, 287 Mont. at 20, 951 P.2d at 1007 ("[T]he prosecutor's acquiescence in--and the District Court's grant of -- the motion *in limine* in this case reflect that all involved conceded the prejudicial effect of evidence that Partin had been arrested on a prior occasion.").

Even greater prejudice was created by the fact that the State was allowed to use the evidence after the district court had ruled otherwise, and after the State had said it did not intend to use it. Surely the State knew in advance what defense counsel could not--that Finneman's trial testimony was going to differ from her statement to police and what her explanation for that change was going to be. Yet, the State stood silent on the issue during the hearing on the motion *in limine*, representing to the court and to defense counsel that it did not intend to use prejudicial evidence of prior violence. Thus, Strong lost his opportunity to prepare for the use of the evidence, to try to lessen its impact, and to *voir dire* the jury on the effect of such evidence. *See State v. Doll*, 214 Mont. 390, 397, 692 P.3d 473, 376 (1985) (finding prejudice where the district court had issued a pretrial order prohibiting the use of prior crimes and later changed its decision to allow such evidence).

The State cannot be allowed to knowingly create a situation in which a defendant will unwittingly open the door to prior bad acts evidence and the State will seize the opportunity to admit evidence that it had previously agreed was prejudicial and represented that it did not intend to use. In this respect, this case differs from *Veis*; there, the State moved pretrial to allow the victim to testify about the defendant's prior crimes to rehabilitate his credibility if the defendant impeached it. *Veis*, ¶ 15.

Finally, under *Partin* the Court considers whether a cautionary instruction could cure any prejudice. "Generally, an error in the admission of evidence may be cured if the jury is admonished to disregard it." *Partin*, 287 Mont. at 21, 951 P.2d at 1007 (citation and quotation marks omitted). Here, however, the district court ruled, twice, that it would not give a cautionary instruction. The district court explained that it considered whether to give a cautionary instruction, but apparently decided one was not necessary because the question as to why Finneman was afraid of Strong was "a logical question under the circumstances." (Tr. at 251.) The State then said it had no objection to a limiting instruction, yet the district court ruled again that it would not give one. (Tr. at 252.) (Naturally, defense counsel did not request a cautionary instruction after the court had already stated, twice, that it would not give one.) Accordingly, there was no cautionary instruction that could have cured any prejudice; the jury was left to consider the

evidence of prior violence against the victim's mother however it wanted, including to conclude that Strong must have a propensity toward violence against intimate family members.

A reasonable possibility exists that the highly inflammatory evidence of violence against the victim's mother might have contributed to Strong's conviction. Strong was entitled to a trial free from such influence. The district court abused its discretion by denying Strong's motion for a mistrial.

III. THE RESTITUTION PROVISION WAS ILLEGAL.

A. Blue Cross Did Not Meet the Statutory Definition of "Victim."

The Montana statutory restitution provision states:

> In addition to any other penalties imposed, if a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere and the sentencing judge finds that a victim, as defined in 46-18-243, has sustained a pecuniary loss, the sentencing judge shall, as part of the sentence, require payment of full restitution to the victim, as provided in 46-18-241 through 46-18-249, whether or not any part of the sentence is deferred or suspended."

Mont. Code Ann. § 46-18-201(5). Relevant here, Mont. Code Ann. § 46-18-243(2)(a)(iv) defines a "victim" for restitution purposes as: "an insurer or surety with a right of subrogation to the extent it has reimbursed the victim of the offense for pecuniary loss."

Strong's trial counsel did not contest below that Blue Cross had reimbursed the victim's mother for medical expenses totaling $11,194. (Tr. at 382.)

Nevertheless, as trial counsel argued, Blue Cross did not meet the statutory definition of "victim." Specifically, there was no evidence that Blue Cross had a right of subrogation. There was no evidence presented at the sentencing hearing regarding restitution to Blue Cross. The insurance contract between Blue Cross and Finneman, which would have demonstrated whether Blue Cross had a right of subrogation, was not introduced into evidence at the sentencing hearing nor was it attached to the PSI. Nothing in the PSI indicates the probation officer even spoke with Blue Cross (or that Blue Cross even requested restitution), let alone that the probation officer had any indication that Blue Cross had a right of subrogation. *See* Mont. Code Ann. § 46-18-112(1)(f) ("The officer shall make a reasonable effort to confer with the victim to ascertain whether the victim has sustained a pecuniary loss. If the victim is not available or declines to confer, the officer shall record that information in the report.").

The district court concluded Blue Cross was a victim based simply on the fact that Blue Cross paid the medical expenses under an insurance contract (not in the record), with no proof that Blue Cross also had a right of subrogation against its insured. (Tr. at 397 ("They were out that sum simply because of an insurance contract. I look at them as a victim."). Yet, Mont. Code Ann. § 46-18-243(2)(a)(iv) authorizes the district court to impose restitution to an insurer only if the insurer has a right of subrogation.

Accordingly, on this record Blue Cross does not meet the statutory definition of "victim" under Mont. Code. Ann. § 46-18-243. Because the district court lacked statutory authority to impose restitution to Blue Cross, the provision is illegal and should be struck. *State v. Krum*, 2007 MT 229, ¶¶ 25-26, 339 Mont. 154, 168 P.3d 658 (striking assessments made without statutory authority).

Should the State contend otherwise, Strong submits this issue is properly before this Court. Trial counsel objected to restitution before the district court on the ground that Blue Cross was not a "victim" under the statute. (Tr. at 382.) Although trial counsel did not specifically cite the definition of victim in Mont. Code Ann. § 46-18-243(2)(a)(iv), counsel's objection was sufficient to present the issue of whether Blue Cross met the statutory definition of victim to the district court and give it the opportunity to rule upon it (which it did). *See e.g.*, *State v. Butler*, 272 Mont. 286, 290-91, 900 P.2d 908, 910-11 (1995) (holding the defendant sufficiently raised the issue of his Fifth Amendment right against self-incrimination, even though he did not cite the Fifth Amendment or specific caselaw, when he informed the district court of misgivings over having to admit guilt before undergoing sexual offender evaluation and treatment).

In any event, Strong would be allowed to raise this issue for the first time on appeal because he contends the restitution order is illegal and outside the statutory parameters because the district court lacked statutory authority to impose it in this

case. *See e.g.*, *State v. Coluccio*, 2009 MT 273, ¶ 38, 352 Mont. 122, 214 P.3d 1282 (holding restitution provision requiring payment of travel expenses incurred by victim's friends in attending hearings was illegal).

B. The Statutory Affidavit Requirement Was Not Met.

"District courts are not authorized to impose a sentence of restitution until all these additional statutory requirements [of Mont. Code Ann. §§ 46-18-241 through -249] are satisfied." *State v. Pritchett*, 2000 MT 261, ¶ 7, 302 Mont. 1, 11 P.3d 539. Where, as here, the court fails to meet these statutory requirements, the restitution condition is illegal. *Pritchett*, ¶ 13. A defendant may raise a claim of an illegal sentence for the first time on appeal. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

Montana Code Annotated § 46-18-242 requires that, where a PSI is ordered, the PSI shall include "an affidavit that specifically describes the victim's pecuniary loss and the replacement value in dollars of the loss, submitted by the victim." Here, the PSI did not include an affidavit describing Blue Cross's pecuniary loss. Nor was there any evidence presented at the sentencing hearing that could arguably substitute for the requisite affidavit. *Coluccio*, ¶ 37. Should the Court disagree that the district court lacked statutory authority to impose restitution to Blue Cross and strike the order, Strong submits the Court should vacate the restitution order

and remand for further proceedings based on the failure to include a victim affidavit. *State v. Hunt*, 2009 MT 265, ¶ 24, 352 Mont. 70, 214 P.3d 1234.

C. In the Alternative, the Restitution Order Should Be Vacated Because Strong Was Denied Effective Assistance of Counsel.

In the alternative, the restitution order should be vacated because Strong received ineffective assistance of counsel as to the restitution order.

The Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, and Article II, Section 24 of the Montana Constitution guarantee a defendant's right to assistance of counsel. When analyzing an ineffective assistance of counsel claim, this court applies the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Kougl*, ¶ 11. Accordingly, a defendant "must demonstrate that (1) counsel's performance was deficient or fell below an objective standard of reasonableness, and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal quotation marks omitted).

This Court will review of an ineffective assistance of counsel claim on direct appeal where the record reveals why counsel acted as he did or where there is no plausible tactical justification for the attorney's action or omission. *Kougl*, ¶¶ 14-15.

Should this Court hold that Strong did not sufficiently raise below the issue that Blue Cross does not meet the statutory definition of victim in Mont. Code Ann. § 46-18-243(2)(a)(iv) or that he cannot raise it for the first time on appeal, Strong submits in the alternative that his trial counsel was ineffective for failing properly to challenge the restitution order on this basis.

As discussed above, Blue Cross plainly did not meet the statutory definition of "victim" for restitution purposes on the record before the district court because there was no evidence that Blue Cross had a right of subrogation. Had trial counsel argued this point (assuming he did not do so sufficiently), the district court would have determined that it could not order restitution to Blue Cross. There may be instances in which a defendant and his counsel determine, for tactical reasons, not to object to restitution. Having determined he would object to the imposition of restitution, however, there is no plausible explanation for failing to argue there was no evidence that Blue Cross had a right of subrogation (or, indeed, that Blue Cross was requesting restitution at all).

Because there is no plausible explanation for trial counsel's failure to argue this point, this Court may review it on appeal. *Kougl,* ¶¶ 14-15. Moreover, because there is no plausible explanation for the failure, counsel's performance was deficient and fell below an objective standard of reasonableness; accordingly, the first prong of the *Strickland* test is met. *Kougl*, ¶ 24. The second prong of the

Strickland test, prejudice, also is met. Had trial counsel sufficiently raised the issue of Blue Cross' failure to meet the statutory definition of "victim," the district court would have realized that, on the record before it, it was not authorized to order restitution and would not have done so. Accordingly, there is a reasonable probability that, but for counsel's error, the result of the sentencing proceeding would have been different. *Kougl*, ¶ 25.

Trial counsel also was ineffective because he: (1) conceded the amount Blue Cross had paid for the victim's medical costs; (2) failed to argue the court could not impose restitution in the absence of a victim affidavit specifically describing pecuniary loss as required by Mont. Code Ann. § 46-18-242; and (3) failed to argue the court could not impose restitution in the absence of any evidence in the record substantiating an award of restitution as required by Mont. Code Ann. § 46-18-243(1)(a).

Again, there may be tactical reasons to concede the amount of loss, for example to gain favor with the State or the district court. However, once counsel determined his strategy was to challenge the imposition of restitution and thus abandon a tactic of currying favor, there is no plausible explanation for conceding the amount of loss nor for failing to argue that restitution could not be imposed where there was no victim affidavit as required by Mont. Code Ann. § 46-18-242 nor any evidence in the record substantiating an award of restitution as required by

Mont. Code Ann. § 46-18-243. As such, the claim is properly before this court, and counsel's performance was deficient. *Kougl*, ¶ 24. Had counsel raised these issues before the district court, it would have determined that it could not impose restitution to Blue Cross absent an affidavit, s*ee Hunt*, ¶ 24, or evidence in the record substantiating the restitution amount, *see Coluccio*,¶ 45. Accordingly, Strong was prejudiced by counsel's failure. *Kougl*, ¶¶ 24-25.

CONCLUSION

Strong was denied an initial appearance at which he was informed of his rights, including the right to counsel, without unnecessary delay. Accordingly, he respectfully requests this Court vacate his conviction and remand with instructions that the Information be dismissed without prejudice. In the alternative, he requests this Court vacate his conviction and remand for a new trial on the basis that the district court abused its discretion when it denied his motion for a mistrial based on the admission of unfairly prejudicial evidence of prior violence against the victim's mother. If the Court does not vacate his conviction, Strong requests this court strike the illegal restitution condition of his sentence.

Respectfully submitted this 4th day of January, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

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APPENDIX